IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 528.

THE OHIO OIL COMPANY, a Corporation, and MAGNOLIA PETROLEUM COMPANY, a Corporation (Appellants),
Petitioners,

vs.

GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor (Appellee),
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

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GUY A. THOMPSON, Trustee for Missouri Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor (Appellee),
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, the Ohio Oil Company, a corporation, and Magnolia Petroleum Co., a corporation (appellants in the court below), respectfully show unto the Court:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a decision and judgment made and entered in said Circuit Court of Appeals on June 23, 1941 (Sanborn, Woodrough and Thomas, Circuit Judges sitting).

The decision and judgment sought to be reviewed dismissed for want of jurisdiction consolidated and joint appeals to that court, wherein petitioners, Ohio Oil Co. and Magnolia Petroleum Co., were appellants and Guy A. Thompson, Trustee of Missouri-Pacific Railroad Co., Debtor, and Missouri-Illinois Railroad Co., Subsidiary Debtor, was the appellee, said appeals being Nos. 11,915 to 11,917, inclusive.

The appeals to the United States Circuit Court of Appeals were taken from an interlocutory decree entering an injunction, after hearing, in a controversy "arising in bankruptcy proceedings" by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, sitting as a Court of Bankruptcy in the reorganization proceedings of the Missouri-Pacific Railroad Company, Debtor, and Missouri-Illinois Railroad Company, Subsidiary Debtor.

On application of petitioners, the issuance of the mandate of the Circuit Court of Appeals was on the 28th day of July, 1941, stayed to afford petitioners an opportunity to apply to this Court for a writ of certiorari.

STATEMENT.

One phase of this controversy was before this Court on certiorari to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in which the case of Thompson, Trustee, v. Magnolia Petroleum Co. et al., 106 Fed. (2d) 217, was reversed. The opinion of this Court, on certiorari, Thompson, Trustee, v. Magnolia Petroleum Co. et al., is reported in 309 U. S. 478.

The decision and judgment here sought to be reviewed arise out of proceedings in the District Court subsequent to the decision of this Court in Thompson, Trustee, v. Magnolia Petroleum Co., 309 U. S. 478, and after the entry

of the mandate by the United States District Court in compliance with the decision of this Court.

The question which the United States Circuit Court of Appeals refused to entertain involved the validity of an order of the United States District Court, sitting as a Court of Bankruptcy, entering an interlocutory decree and injunction after hearing, enjoining petitioners from asserting counterclaims filed according to Illinois procedure and practice as defendants in plenary suits instituted by Trustee in the Circuit Court of Marion County, Illinois. The plenary suits in Illinois were filed by Trustee at the direction of the Bankruptcy Court (R. 52) pursuant to the mandate of this Court in the case of Thompson, Trustee, v. Magnolia Petroleum Co. et al., 309 U. S. 478. The mandate of this Court was received and filed by the United States District Court on April 26, 1940 (R. 48), and the decree directing the institution of said plenary suits was entered on the 24th day of May, 1940 (R. 52).

The Missouri-Illnois Railroad Company, doing business in the State of Illinois, by petition duly filed and approved, became a subsidiary debtor of the Missouri-Pacific Railroad Co. in proceedings for the reorganization of a railroad under Section 77 of the Bankruptcy Act. Guy A. Thompson, the respondent here, is Trustee for the Debtor and the Subsidiary Debtor.

On November 1, 1938, in the reorganization proceedings, Trustee filed a petition with the United States District Court, designated as "Petition of Trustee for Determination of Title and for Advice and Directions Respecting Certain Proposed Oil Operations on Right of Way Near Salem, Illinois" (R. 27).

In that petition Trustee claimed the oil and gas underlying the right of way of the Debtor, Missouri Pacific Railroad Company, in section 20, Marion County, Illinois.

Trustee also, in that petition, claimed the fee to the right of way and prayed for authority to enter into a contract for the purpose of drilling and recovering the underlying oil and gas. Petitioners, Ohio Oil Company and Magnolia Petroleum Company, claimed the oil and gas underlying the right of way by virtue of oil and gas leases from the fee-simple owners of said property and denied that the Trustee owned the fee and contended that Trustee owned only an easement for railroad purposes.

On November 14, 1938, the District Court entered an order authorizing Trustee to enter into a contract with certain companies to drill on the right of way and to remove and market the oil and gas taken from said premises. The proceeds from the sale of the oil were ordered paid over to the Trustee, and, after deducting the expenses of drilling, removing and marketing said oil, Trustee was ordered to impound the residue for the account of adverse claimants as their rights might thereafter be determined.

All parties were enjoined and restrained from interfering with the drilling of said wells or the sale of said oil.

Thereafter petitioners appealed to the United States Circuit Court of Appeals for the Eighth Circuit, and the order appealed from was on the 5th day of September, 1939, reversed in its entirety and the District Court was directed to dismiss the petition of Trustee for want of jurisdiction (R. 46).

Certiorari was granted by this Court on petition of Trustee. After the decision of this Court on certiorari in the case of Thompson, Trustee, v. Magnolia Petroleum Co. et al., 309 U. S. 478, on the 26th day of April, 1940, the mandate of this Court was filed in the United States District Court, which provides in part as follows:

> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of

the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed with costs, and that the decree of the District Court, in this cause, be, and the same is, hereby affirmed **except in so far as it provides for adjudication of the disputed ownership** in the Bankruptcy Court. (Emphasis ours.)

* * * * * * *

"And it is further ordered that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Missouri with instructions to modify its order **so as to provide appropriate submission of the question of fee-simple ownership of the right of way to the Illinois State Courts**" (R. 47). (Emphasis ours.)

Pursuant to this mandate, the District Court, on May 24, 1940, entered what is designated as "Supplemental Order No. 1167-A" (R. 48-53). In that order Trustee was directed to institute an appropriate action or actions "in the state courts of Illinois to determine the question of fee-simple ownership of the strip of land on which the right of way of Missouri-Illinois Railroad is situated across the SW¼ of the NE¼ and across the SE¼ of the NW¼ and the NW¼ of the SW¼, all in Sec. 20, T. 2 N., R. 2 E., Salem Township, Marion County, Illinois" (R. 52-53).

The order also provided that nothing contained in the interlocutory decree of November 14, 1938, "shall prevent the assertion in such proceedings of adverse claims to title in the state courts of Illinois by any proper party in interest" (R. 53).

Thereafter, Trustee, as plaintiff, together with certain other new parties, filed in the Circuit Court of Marion County, Illinois, two complaints in equity to quiet title. One complaint, in which the Magnolia Petroleum Company was named one of the parties defendant, relates to that portion of the right of way covered by the leases of the

Magnolia Petroleum Company. All parties having any interest in said leases were also named parties defendant in said proceedings in Illinois. A similar complaint was filed by Trustee and the same parties plaintiff in the Circuit Court of Marion County, Illinois, in which the Ohio Oil Company is named defendant along with other parties having any interest in said property. The petitioners have been personally served as defendants in the proceedings in Illinois, where they are qualified to do business, and prior to the return day each of the petitioners in the proceedings in Illinois filed its answer and counterclaim, setting up its claim to the title to the property in question and praying that in the event the Court found that the plaintiff Trustee did not have the fee-simple title to the property in question, that he then be enjoined from further removing oil from said premises and be required to account to petitioners (defendants in the Illinois cases) for the oil and gas removed from said right of way where it crosses the land in which petitioners are interested.

Copies of Trustee's complaint in the Magnolia Petroleum Co. case and of the answer and counterclaim of Magnolia Petroleum Co. filed in the Illinois proceedings appear at pages 67 to 94 of the record. The pleadings in the Ohio Oil Co. case are substantially identical with those in the Magnolia Petroleum Co. case.

After said proceedings had been instituted by Trustee in the Circuit Court of Marion County, Illinois, and after the answers and counterclaims of defendants had been filed, Trustee, on October 11, 1940, filed with the District Court below a motion designated to be for amplification of Supplemental Order No. 1167-A, the order entered to comply with a mandate of this Court (R. 53).

In that motion Trustee sought to enjoin petitioners from asserting their counterclaims filed in the Circuit

Court of Marion County, Illinois, in the suit brought in that court. A hearing on the motion of Trustee was had on October 11, 1940. Petitioners at the hearing limited their appearance and appeared specially to object to the jurisdiction of the court to enter the supplemental order prayed by Trustee and filed their formal objections thereto (R. 57).

On November 16, 1940, the District Court entered Supplemental Order No. 1167-B, as prayed by Trustee, which provided that Supplemental Order No. 1167-A, entered on May 24, 1940, be amplified by adding to the end thereof the following paragraph:

> "Pending determination in the courts of Illinois of 'the question of fee-simple ownership of the right of way in question, and the entry of an appropriate order by this court in conformity with the construction of the conveyances in question by the Illinois courts, nothing herein contained shall be construed as permitting Magnolia Petroleum Co., Ohio Oil Co., or other adverse claimants to seek in said Illinois courts an order enjoining Trustee or his agent, Blackstock Oil Co., from continuing to drill, conserve, and market oil from the right of way in question as heretofore or hereafter authorized by the orders of this court, nor shall anything herein contained be construed as permitting Magnolia Petroleum Co., Ohio Oil Co., or other adverse claimants to seek in the courts of Illinois, through counterclaim or otherwise, an order directing Trustee or his agent, Blackstock Oil Co., or the trustees under the Missouri-Illinois Railroad Co. First Mortgage, to account to said adverse claimants for the oil or gas removed, pursuant to this court's directions, from the right of way, or permitting them to seek damages in said courts for alleged wrongful and unlawful trespass of Trustee and his agents'; it being the intention of this order to permit to be adjudicated in

the courts of Illinois solely 'the question of fee-simple ownership of the right of way,' and this Court reserves exclusive jurisdiction to determine whether Trustee shall be permitted to continue to remove and market oil from said right of way or to drill additional wells thereon, and to determine to what extent the cost of drilling, conserving, and marketing said oil shall be paid out of the gross proceeds of said oil."

From this order entered on November 16, 1940, petitioners perfected their joint and consolidated appeals to the United States Circuit Court of Appeals. That court dismissed the appeals for want of jurisdiction, for the reason that the question presented on the appeal involved the construction and interpretation of the opinion and mandate of this Court in the case of Guy A. Thompson, Trustee, v. Magnolia Petroleum Co. et al., 309 U. S. 478.

It was petitioners' contention that the proceedings culminating in the order of November 16, 1940, were subsequent to the order of May 24, 1940, which complied with the mandate of this Court and related to new matters and issues not determined by the decision and mandate of this Court, and hence were properly appealable to the United States Circuit Court of Appeals.

JURISDICTION.

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the Judicial Code (Title 28, U. S. C. A., Sec. 347) and Section 24-c of the Bankruptcy Act (Title 11, U. S. C. A., Sec. 47-c).

OPINION AND DECREE SOUGHT TO BE REVIEWED.

The opinion and judgment sought to be reviewed was filed in the case of Magnolia Petroleum Co. and Ohio Oil Company v. Thompson, Trustee, et al., Court of Appeals

Docket Nos. 11,915 to 11,917, inclusive, on June 23, 1941 (R. 100 and 111); the petition for rehearing was filed July 7, 1941 (R. 122), and the Court's order denying said petition for rehearing was filed July 14, 1941 (R. 123).

THE QUESTIONS PRESENTED.

1. The United States Circuit Court of Appeals for the Eighth Circuit failed to exercise its appellate jurisdiction granted to it under the provisions of Section 129, Judicial Code (28 U. S. C. A., Sec. 227), in that the order appealed from in force and effect was an order by the United States District Court granting an injunction after hearing in a controversy "arising in bankruptcy proceedings." The United States Circuit Court of Appeals likewise had jurisdiction of the appeals under Section 24 (a), as amended, of the Bankruptcy Act [11 U. S. C. A., Sec. 47 (a)].

2. The United States Circuit Court of Appeals for the Eighth Circuit failed to exercise its appellate jurisdiction contrary to such authoritative decisions of this Court as Sprague v. Ticonic Bank, 307 U. S. 161; Mason v. Pewalic Mining Co., 153 U. S. 361; Re Sanford Fork & Tool Co., 160 U. S. 247.

3. The new issue which arose subsequent to the mandate of this Court, pursuant to its opinion in Thompson, Trustee, v. Magnolia Petroleum Co., 309 U. S. 478, which the United States Circuit Court of Appeals refused to review, involves an important question of bankruptcy; that is, the status of a trustee as a party litigant in a state court when instructed to institute a plenary suit therein. As a corollary, a further important question is presented, that is, may the bankruptcy court retain jurisdiction of an issue which under state practice is an integral part of the plenary litigation instituted by Trustee in the state court upon the direction of the bankruptcy court?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The principal questions presented by this petition may be summarized as follows:

1. The United States Circuit Court of Appeals had jurisdiction of the appeals in question under the provisions of Section 129, Judicial Code (28 U. S. C. A., Section 227), and Section 24 (a), as amended, of the Bankruptcy Act [11 U. S. C. A., Sec. 47 (a)], in that the appeals were from an order granting an injunction after hearing in a controversy "arising in bankruptcy proceedings."

This Court, in its mandate, directed the District Court to "modify its order so as to provide appropriate submission of the question of fee-simple ownership of the right of way to the Illinois State Courts" (R. 47).

On May 24, 1940, the District Court complied literally with the mandate by ordering the Trustee to "proceed in appropriate action or actions in the state courts of Illinois to determine the question of fee-simple ownership * * *" (R. 52).

This decree followed the mandate and opinion of this Court in the case of Thompson, Trustee, v. Magnolia Petroleum Co. et al., 309 U. S. 478. As petitioners understand that opinion, it clearly contemplated that the Trustee should bring an appropriate proceeding in the state courts of Illinois to determine title as any other party litigant. The opinion of this Court stated that "* * * It is desirable to have the litigation proceed in the state courts of Illinois" (309 U. S. 483). This does not mean only certain phases of the litigation, but all the elements relating to the suit to quiet title.

It is worthy of emphasis that this Court, in its opinion,

and in its mandate, in no sense limits Trustee in the suit to be instituted, other than that it should "* * * provide appropriate submission of the question of fee simple ownership of the right of way to the Illinois state courts."

It is further worthy of emphasis that this Court, in its opinion, neither by direct words nor by inference, attempts to guide the procedure of the Illinois courts nor to limit the prospective defendants in how they shall defend themselves in that suit or in the exercise of the right that any defendant in the Illinois court might have in resisting such proceedings.

It is also worthy of emphasis to point out that this Court in its opinion sets forth the status of the Trustee as a litigant in the Illinois courts in the following language:

> "An order to the Trustee to proceed in the Illinois courts for a decision on the ownership of the fee to the right-of-way lands will be comparable to one in which the Bankruptcy Court, preserving the status quo the while, orders a trustee to determine in a plenary state court suit the legal right to property alleged by the trustee to have been fraudulently transferred by the bankrupt." 309 U. S. 483.

In the light of the background sketched above, the Trustee did file plenary actions in the Illinois state courts and petitioners, in accord with Illinois practice and law, filed answers and counterclaims [Chapter 110, Sec. 162, Ill. Revised Statutes 1939, authorizing the filing of a counterclaim; Martin v. Strubel, 367 Ill. 21-23, holding that when an Illinois court of equity has jurisdiction for one purpose it has jurisdiction for all related purposes and will proceed to determine all matters in issue and to do complete justice between the parties.]

After the answers and counterclaims in question had

been filed, Trustee then filed a motion purporting "to amplify" the decree of May 24, 1940. After hearing, arguments and briefs, the District Court, on November 16, 1940, entered the order complained of, enjoining petitioners from prosecuting their counterclaims in the Illinois courts.

The right to prosecute these counterclaims was in no wise touched upon in the opinion and mandate of this Court; they relate to an issue not before this Court in those proceedings, namely, the reciprocal rights and liabilities as between the parties in the event the Trustee is unsuccessful in establishing his claim to title. The primary issue in the prior proceedings, culminating in the opinion of this Court, was the summary jurisdiction of the bankruptcy court to enter the interlocutory order there complained of and to permit the Trustee to drill and dispose of the oil pending final determination of the litigation. Nowhere does the Court decide that if the Trustee does not have title what the rights and liabilities between the parties shall be. That question was not then in issue.

If title is ultimately vested in petitioners, then in such event their right of affirmative relief as against Trustee should be determined under the laws of the State of Illinois, which include the right to injunction, counterclaim and damages (Chapter 110, Sec. 162, Ill. Rev. Stat. 1939; Bruner v. Hicks, 230 Ill. 536; Greer v. The Carter Oil Co., 373 Ill. 168-175).

The essence of this Court's decision was to give to Trustee an opportunity to recover the oil underlying the right of way, minus the cost of drilling and operation, which would have been a cost to the Debtor estate even if no adverse claim had been asserted and there was no question as to title, and to retain the same if Trustee could estab-

lish title. There was no isue before the Court as to the status of Trustee in the event that Trustee was unable to establish title. That question was first put at issue in the counterclaims enjoined by the order complained of.

It therefore seems indisputable, despite the decision of the Circuit Court of Appeals, that the order complained of related to issues and questions not determined by the opinion and mandate of this Court in the prior proceedings.

In such circumstances, the decision of the lower court upon such matters should be reviewed by the proper court (Ex parte Union Steamboat Co., 178 U. S. 317; Sprague v. Ticonic Bank, 307 U. S. 161; Re Sanford Fork & Tool Co., 160 U. S. 247; Mason v. Pewabic Mining Co., 150 U. S. 361).

Since the order complained of was in force and effect, an order by the U. S. District Court granting an injunction, after hearing, in a controversy arising in bankruptcy proceedings, petitioners' remedy was by appeal to the United States Circuit Court of Appeals for the Eighth Circuit, as provided by Section 129, Judicial Code, as amended (28 U. S. C. A., Sec. 227), and Section 24 (a), as amended, of the Bankruptcy Act [11 U. S. C. A. 47 (a)].

2. The new issue relating to the counterclaims filed in the Illinois State Courts, which arose subsequent to the mandate of this Court, and which the U. S. Circuit Court of Appeals refused to review, presents the question as to the status of a trustee as a party litigant in a state court when instructed to institute a plenary suit therein.

The District Court, on the one hand, directed Trustee, by its order of May 24, 1940, to institute an appropriate action or actions in the "State Courts of Illinois to determine the question of fee-simple ownership of the strip of land on which the right of way is situated across (certain

described real estate), all in Marion County, Illinois" (R. 52-53). On the other hand, in the new proceedings culminating in the order of November 16, 1940, the Court tersely states, "It being the intention of this order to permit to be adjudicated in the courts of Illinois solely, 'the question of fee-simple ownership of the right of way'" (R. 60).

These orders are the direct antithesis of each other. In the order of May 24, 1940, the Trustee is directed to bring a plenary suit; by the order of November 16, 1940, the District Court purports to limit the jurisdiction procedure and issues of the plenary suit. Can the District Court, sitting as a court of bankruptcy in one state, direct its Trustee to institute a plenary suit in the state court of another state and then, by subsequent order, change the suit thus instituted after service and after the issues have been made up under state practice from a plenary suit to a proceeding of a limited character? It seems self-evident that this is beyond the jurisdiction of any federal court and is contrary to that comity which should exist between the federal courts and the courts of the several states of the United States of concurrent jurisdiction.

Such procedure as here attempted inevitably would result in a conflict of jurisdiction between the federal and state courts. The language of this Court, in the early case of **Peck v. Jenness,** 7 Howard 612 (U. S. 1849), holding that a federal court, sitting in bankruptcy, had no power to discharge the lien of a prior attachment on property made under state laws, is apropos, and is as follows:

> "These rules have their foundation, not merely in comity, but on necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." 7 How. 625.

The order of the District Court is contrary to the dignity of the courts of Ilinois. Those courts are not a fact-finding body for a federal court. If nothing but the state of title is to be adjudicated in the courts of Illinois in the suit there instituted by the Trustee, the resulting judgment would be no more than a declaratory judgment declaring the state of title. The Illinois statutes contain no provision for a declaratory judgment.

A corollary to this question is that the order of November 16, 1940, has the effect of the bankruptcy court attempting to retain jurisdiction of an issue which, under Illinois practice, is an integral part of the plenary litigation instituted by Trustee. Under Illinois practice, in a suit to quiet title, the defendant has the right to file a counterclaim (Chapter 110, Sec. 162, R. S. of Ill. 1939), and, if the defendant successfully establishes title, he may by counterclaim secure affirmative relief in the nature of an injunction, accounting and damages, under the well-established principle that if a court of equity has jurisdiction for one purpose it will take jurisdiction for all related purposes (Martin v. Strubel, 367 Ill. 21-23).

In practical effect, the order complained of will prevent petitioners from asserting in the appropriate forum the affirmative relief to which they are entitled in the event the Trustee is unable to establish title to the real estate involved and hence to the oil in controversy. The question of the affirmative relief to which petitioners may be entitled under such circumstances is a question to be determined under the laws of the State of Illinois, as they are essential issues flowing from the determination of title.

It not only would be to create needless litigation, but it would also be incongruous to determine the state of title in the Illinois courts and then return to the bankruptcy courts in Missouri to determine issues which logically and nat-

urally, and most economically, could be determined by the Illinois court having jurisdiction in rem of the real estate in question and over the persons of the parties litigant.

The foregoing demonstrates the type and character of issues which were injected into this proceeding after the mandate of this Court had been filed by the proceedings culminating in the order of November 16, 1940. Certainly they were neither directly nor indirectly involved in the prior proceedings in this court.

The order complained of is without precedent, and in principle and theory is contrary to well-grounded and essential principles of comity as between federal and state courts of concurrent jurisdiction.

Wherefore, petitioners, referring to the attached brief in support of the foregoing reasons for review, respectfully pray that this Court issue a writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Circuit, to certify and to send to this Court a full and complete transcript of record herein, bearing the Court of Appeals Docket Nos. 11,915 to 11,917, inclusive, to the end that the said case may be reviewed and determined by this Court, as provided by law, and that the decision of the Circuit Court of Appeals may be reversed, and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

Respectfully presented,

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BRIEF

In Support of Foregoing Petition for Certiorari to United States Circuit Court of Appeals, Eighth Circuit.

I.

The United States Circuit Court of Appeals had jurisdiction of the appeals in question.

When this matter was originally before this Court it was concerned with not only the summary jurisdiction of the court of bankruptcy, but also the practical situation created by the subject matter of the litigation, namely, the fugacious character of oil.

This Court, in its opinion, pointed to the malleable jurisdiction of the bankruptcy courts and worked out a practical solution of the problems involved; that is, that pending the final determination of the ownership of the oil, the state courts of Illinois should determine the question of title, and that, in the meantime, the Trustee might recover and market the oil, paying for the cost of drilling and marketing out of the proceeds, and impounding the balance. This, however, pending final determination on the merits and not as a final adjudication of the rights as between the parties.

Petitioners suggest that the Court had in mind that this was a bankrupt estate, and in that manner the Trustee would have an opportunity to recover the estate's entire interest in the oil, if the Trustee could ultimately establish title, just as if no adverse claim had ever been asserted.

The expense of drilling and marketing oil would be a necessary expense for the Trustee under any circumstances. This is not true, in so far as petitioners are concerned, if they are able to establish title. Petitioners

could have recovered the oil in question without the expense of additional wells. This is clear from Trustee's own theory that the wells of petitioners, adjacent to the right of way, were recovering the oil from under the right of way, and this was the justification for the authority to drill before the question of title was determined (R. 31-42).

If petitioners establish their title and receive only the net, the effect of these proceedings will be that petitioners have financed Trustee in his operation, although he acted with full notice of petitioners' alleged rights; that is, under such a theory Trustee has everything to gain and nothing to lose, all at the expense of petitioners. This involves a substantial sum, which, if petitioners are successful in establishing title, will have been paid out of petitioners' own pocket.

It appears from the contract for drilling that each well is estimated to cost from $12,800 to $14,400, depending on the formation drilled to (R. 32).

In the supplemental order of May 24, 1940 (R. 48), the District Court found that prior to that date, on the right of way in question, Trustee had drilled to varying formations fifteen wells (R. 51-52). Based on the contract price, these wells, not counting the cost of operation or sale of oil, involve a sum of approximately $200,000.00 paid out of the oil recovered.

Petitioners respectfully urge that equity is not so blind as to so unfairly favor Trustee, who, in this respect, is taking a business chance that any other business man would risk under similar circumstances. This Court, in its opinion, does not define or adjudicate the reciprocal rights and liabilities of the parties in the event Trustee is unsuccessful in establishing his title and thus ownership to the oil in controversy. The Court, in its opin-

ion, goes no further than to say that "Trustee may be so authorized * * * until final determination of the controversy over title to the right-of-way lands, 309 U. S. 482."

In the preceding paragraph of the opinion this Court concludes that "the right to the disputed oil necessarily hinges upon where the ownership of the fee to these lands lies." Not the right to part of the oil, but to all of the disputed oil. The Court advises that Trustee may so act "until final determination of the controversy." What is the controversy? It is the ownership of all the oil, and final determination must relate to a final judgment as to the ownership of all the oil. The controversy over title to the right of way is only an incident to the ultimate question, that is, the ownership of the oil.

This Court, by its decision, on the one hand, having protected the estate to the ultimate measure of its possible recovery, on the other hand directs Trustee to bring plenary suits in the state courts of Illinois, as any other litigant, in order to determine the rights of the parties to the oil in controversy under the state law.

One of the consequences of ordinary litigation in the state courts in Illinois in a suit to determine title is the right of the adversary party to claim that the title to the property in dispute is vested in the defendant and in the event the defendant is successful to counterclaim and secure damages as against the plaintiff for use or conversion of the property or for trespass and an accounting for the profits from the premises, and the ultimate relief is to enjoin the adversary or losing party from any other or further interference with the successful party's property. (Chapter 110, Section 162, Illinois Revised Statutes 1939; Bruner v. Hicks, 230 Ill. 536; Greer v. The Carter Oil Co., 373 Ill. 168-175; Zeigler v. Brenneman, 237 Ill. 1516;

Perrin v. Chicago and Herrin Coal Co., 173 Ill. App. 287-292.)

In the final analysis, this Court, in its opinion and mandate, did no more than to give Trustee an opportunity to recover, if successful in his claim for title, the full measure of the debtor's interest in the property in dispute. It in no wise directly or indirectly determined the question as to the rights between the parties litigant in the event Trustee was unsuccessful in establishing title.

The plenary suits instituted by Trustee in the Illinois state courts also involved additional parties plaintiff and additional parties defendant, who at no time were parties to the proceedings culminating in the decision of this Court. This is apparent from the caption and allegations of the bills filed in the Illinois state courts (R. 66).

In view of the foregoing factual situation, the proceedings in the District Court, culminating in the order of November 16, 1940, related to new matters and issues. Consequently, the order complained of under the decisions of this Court were properly appealable as any other matter might be to the appropriate appellate court (Ex parte Union Steamboat Co., 178 U. S. 317; Sprague v. Ticonic Bank, 307 U. S. 161; Re Sanford Fork & Tool Co., 160 U. S. 247; Mason v. Pewabic Mining Co., 150 U. S. 361).

Since the order complained of was in force and effect an injunction after hearing in a controversy "arising in bankruptcy proceedings," the proper appellate court was the United States Circuit Court of Appeals for the Eighth Circuit, as provided by Section 129, Judicial Code, as amended (28 U. S. C. A., Sec. 27); Section 24 (a), as amended, of the Bankruptcy Act [11 U. S. C. A., Sec. 47 (a)].

It is therefore submitted that the Court of Appeals erred in dismissing the appeals for want of jurisdiction.

II.

The order complained of is contrary to the comity that should exist between the federal courts and the courts of the several states of concurrent jurisdiction.

Although the technical question here at issue is simply whether or not the proceedings culminating in the order of November 16, 1940, were new matters not covered by the opinion and mandate of this Court, there is inherently a much deeper and more significant question.

The record in this case establishes that a trustee in bankruptcy, under the express direction of the bankruptcy court, has instituted in the state courts of Illinois a plenary suit.

The bankruptcy court has relinquished whatever jurisdiction it may have had as to the question of title and all incidental questions flowing therefrom. Under such circumstances the Trustee in the state court is in the position of any other ordinary party litigant. If his position was other than that, then it would not be a plenary suit. It seems incomprehensible that the Trustee, with the sanction of the bankruptcy court, should set in motion the judicial processes of a state and then, by a subsequent order, attempt to limit the jurisdiction of the state court.

From the earliest history of our jurisprudence, the federal courts have respected the dignity of the courts of the several states. This Court, in the case of **Essenay Film Manufacturing Co. v. King**, 285 U. S. 358, pointed out that it was in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of the states in carrying out their domestic policy. The highest form of state government and policy finds its expression in its courts, their procedure and the rights accorded to litigants.

This relationship is trespassed upon by the order complained of. It is sought to be justified on the theory that this Court, in its opinion and mandate, so directed the Trustee.

Petitioners, on the contrary, respectfully suggest that this Court, in its opinion and mandate, intended that the bankruptcy court surrender whatever jurisdiction it might have, and that the Trustee should proceed in Illinois as any other party litigant, subject to all of the burdens and liabilities that might be incident to such suit, including Illinois procedure and practices. This is apparent from the direct statement in the opinion that the Trustee's status in Illinois should be comparable to that of a trustee who has been directed by the bankruptcy court to determine in a plenary state court suit the legal right to property alleged by the Trustee to have been fraudulently transferred to the bankrupt.

What the Trustee's position should be in the event he was unable to establish title was not then at issue or in the contemplation of the Court. Under Illinois law, he might be a trespasser, or, on the other hand, his liability might be mitigated in view of the fact that he was acting at the direction of the Bankruptcy Court. This suggestion presents a host of questions which the counterclaims in the Illinois court bring into play.

The prosecution of these counterclaims in Illinois in no wise will interfere with the funds in the hands of the Bankruptcy Court. Should we assume that they are prosecuted to a successful conclusion in favor of petitioners, the final judgment of the Illinois court would then have to be transcripted to the Bankruptcy Court for a final order relating to the proceeds or any judgment in excess of the proceeds as against the Trustee or trust estate. In both theory and in the interest of simplicity of litigation, the

Illinois court is the proper forum to determine all matters incident to or arising out of the plenary suit to quiet title, including the issues presented by the counterclaims enjoined by the order of November 16, 1940.

If this Court sees fit to issue its discretionary writ of certiorari, its opinion, regardless of whether it sustains the opinion and judgment of the Court of Appeals or reverses it, cannot help but have the effect of clarifying the situation created by the order complained of. Also, again, in the interest of economy in litigation, it is respectfully urged that this Court issue its writ of certiorari, directed to the United States Circuit Court of Appeals, for the Eighth Circuit, to the end that the opinion of that Court in causes 11915 to 11917, inclusive, may be reviewed and determined by this Court.

Respectfully submitted,

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